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IV. The foregoing imperfect summary of the present legal doctrines upon the question of mental unsoundness in relation to testamentary capacity, and comparison of the rules of the Courts with the statements of medical writers, show that the former, in almost every case, harmonize with the latter as nearly as can be expected, and as nearly, perhaps, as is possible, in view of the widely different functions of the judge and the physician. It is a frequent subject of complaint among the latter class that the law does not keep pace with advancing medical science. But, from the necessity of the case, great caution must be observed in admitting a medical discovery to modify a rule of law. It would be as unwise to recognise a psychological fact not clearly established, as to ignore such a fact when settled beyond dispute. The rules of law, framed to secure justice to the citizen, must be expressed in certain terms and be universal in their application, and cannot always strictly coincide with the facts of medical experience.

Considered from any point of view, however, the history of the legal doctrines upon the subject under discussion affords an instance of the living principle animating our law, by which, in its gradual development, it conforms itself to the progress of knowledge and the wants and necessities of each successive age.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Maine.

MORRILL *et al.* vs. NOYES, RECEIVER, ETC.

The Y. & C. Railroad Company, in 1851, issued bonds for the purpose of finishing their railroad, and secured them by a mortgage, in trust, of their railroad and franchise, together with all engines and cars then owned, *or afterwards to be purchased and put upon the railroad.* In 1853 the company purchased an engine and certain cars, which, after being used for some time, they mortgaged to other parties. In 1859, a bill in equity was commenced by the holders of the bonds, against the Company and the assignees of the mortgage, to compel them to exe-

cute the trust. A receiver was appointed by the consent of the parties, who took all the property from the possession of the mortgagors, to hold the same, under the direction of the Court, *pendente lite*. The mortgagees under the *second mortgage* thereupon demanded the engine and cars of the receiver, and upon his refusal to deliver the property, they commenced an action of trover, and obtained leave of Court to prosecute it.

Upon these facts, *it was held*, that as the engine and cars came rightfully into the possession of the receiver, and had not been sold by him, there had been no conversion; and even if the property belonged to plaintiffs, they should have tried the *title* by a suit for the *possession*, and could not maintain an action of trover.

It was also held, That under the *first mortgage* a lien was created upon the rolling stock to be subsequently acquired, which attached as it was afterwards purchased and placed upon the railroad by the mortgagors; and that the second mortgagees therefore acquired no title which they could maintain against those holding under the first mortgage.

The facts in this case sufficiently appear in the opinion of the Court, which was delivered by

DAVIS, J.—This is an action of *trover*, against the Receiver of the York and Cumberland Railroad, to recover the value of a locomotive and several cars. The property in controversy was purchased in 1853, at different times, and mortgaged to the plaintiffs in December of that year.

Feb. 6, 1851, the Railroad Company mortgaged to John G. Myers, their railroad, then in process of construction, with all their real and personal property, franchises, &c., “including all cars, engines, and furniture, that have been, or *may be* purchased for or by said company.” This mortgage to Myers was *in trust*, to secure the payment of bonds to be issued for the purpose of finishing the construction and equipment of the railroad; and it was afterwards assigned by Myers, and came into the hands of Churchill and others, who now hold it, in trust, to secure the bonds issued in accordance with its provisions. The papers in the equity suit with which this is connected, show that the mortgage was duly recorded in the registry of deeds for the county, and also in the city registry of mortgages of personal property. The copy in this case has no certificate of registry by the city clerk, but no question is raised by counsel on this point.

In 1859, certain holders of the bonds commenced a suit in equity against the company and Churchill, and others who now hold the mortgage, to compel them to execute the trust created thereby; and Noyes, the defendant, by consent of the parties, was appointed a receiver, to take possession of, hold, and manage the entire property, while the bill should be pending. The engine and cars in controversy were found by him in possession of the company, in daily use upon the railroad; and he took possession of them, with the other property, in March, 1860.

After he had been in possession of the railroad about six months, the plaintiffs demanded the engine and cars mortgaged to them in 1853, and he refused to deliver them. They thereupon commenced this suit, charging him with a conversion of the property on the day of the demand, and claiming to recover the value of it of him, personally.

There is no evidence that they had ever taken the property into their actual possession. By their agent, they nominally took possession of it, while it was in use on the railroad track, in October, 1859. But they did not remove it, or attempt to interfere with the possession of the company. They left it as it was before; and they must have known that the company continued to hold and use it. They must be presumed to have consented to such possession and use. If the company had been strangers, it might have been otherwise. But so long as the mortgagees of such personal property leave it in the possession of the mortgagors, without forbidding them to use it, they certainly cannot be trespassers for so doing.

The counsel for the plaintiffs is undoubtedly correct in saying that, if a receiver should take possession of property not embraced in the order by which he is appointed, or in the commission under which he acts, he would be personally liable to the owner. If he exceeds the authority conferred upon him, he can show no justification as an officer of the court.

But in the case at bar, the property in controversy was embraced in the receiver's commission. It was in the possession of the railroad company, and constituted a part of their rolling stock.

It was mortgaged to the plaintiffs ; the right of redemption, unless the forfeiture had been waived, was lost. But the possession of the company was not wrongful. The receiver succeeded to the rights of the company. As *they* were not trespassers, *he* was not.

Nor do the plaintiffs claim that the defendant came wrongfully into the possession of the property, in March, 1860. They ground their suit upon a subsequent demand made by them, and a refusal by him to deliver it. They allege in their writ a conversion by such refusal, Sept. 24, 1860.

A receiver is not merely an agent of the complainants, in the suit under which he is appointed. He represents the court, for all the parties interested in the property, and acts, instead of the court, for the benefit of all. He is the servant of the court. His possession is the possession of the court ; and any attempt to interfere with it, without leave of court, is a contempt. 2 Story's Eq. 829 ; *Green vs. Bostwick*, 1 Sandf. Ch. 185 ; *Angell vs. Smith*, 9 Vesey 335.

It is the duty of the receiver to take possession of the property. If the person who has possession refuses to deliver it up, if he is a party to the bill, he may be proceeded against for a contempt. If he is not a party, he may be made one for that purpose. Or the receiver, by leave of court, may proceed to recover possession by a suit at law. *Parker vs. Browning*, 8 Paige 388 ; *Wynne vs. Newborough*, 3 Bro. Ch. 88 ; *Green vs. Winter*, 1 Johns. Ch. 60.

After the receiver has taken possession, any person claiming the property, or any interest therein, may present his claim to the court. He may be made a party to the suit in order to establish his claim. Or he may petition to have it heard before a master. Or he may, by express permission of the court, bring a suit *for the possession*, care being taken to protect the receiver. But the receiver will not be ordered to deliver the property to a claimant until his right is established, in one of these modes. Nor can any claimant bring a suit against the receiver, except by leave of court, without being liable for a contempt, if the property is a part of the subject-matter in controversy. 2 Story's Eq. 833 ; 3 Daniel's Ch. 1982 ; 6 Ves. 287 ; *Noe vs. Gibson*, 7 Paige 513 ; *Al-*

bany Bank vs. Schermerhorn, 9 Paige 372; *Howell vs. Ripley*, 10 Paige 43.

These general principles are decisive of the case before us. The receiver came rightfully into possession of the property. It was his duty to retain possession until ordered otherwise by the court. The plaintiffs had leave to bring this suit, but they chose *the form* of their action. They have mistaken their remedy. Their action is not a suit *for the possession*, but is an attempt to hold the receiver *personally* liable for the value of the property. Such an action cannot be maintained under the circumstances of this case. Whether in any case an action of trespass or trover can be maintained against a receiver, when he rightfully takes possession of the property, is a question upon which it is unnecessary for us to express any opinion. If the property is real estate, so that the *title* can be tried in an action of trespass, without changing such title, or rendering the receiver liable for the value, perhaps there would be no objection to its maintenance. Or if he has received the rents of real estate, or *has sold* personal property, by order of the court, perhaps the amount in his hands may be claimed in a suit at law. But in the case at bar, the plaintiffs, if the owners, can only recover the *possession*, in an appropriate action therefor.

But if, for this reason, the plaintiffs cannot recover in this suit, still it may be well for us to examine their title to the property, in order to save further litigation. The question has been fully presented and argued. The plaintiffs claim that the engine and cars sued for could not have been conveyed by the mortgage to Myers, of February 6, 1851, because not in existence at the time. They were not purchased by the railroad company until 1853. As the mortgage to the plaintiffs was made *after* the purchase, their title is good unless the title passed to Myers, in trust, by the first mortgage.

The question whether a mortgage of personal property not in existence, or not owned at the time by the mortgagor, can be made available by the mortgagee, as a lien upon property afterwards ac-

quired, has been discussed in many recent cases, with some apparent difference of opinion.

Some of the courts have denied that any difference exists, and have attempted to reconcile the cases on the ground that such a mortgage, though void *at law*, is valid *in equity*. But this is a loose use of language, that tends more to confuse than to reconcile. If such a mortgage is absolutely void, for want of any subject-matter to support it, then it should be so held in equity, as well as at law. But if not thus void, to what extent is it valid? and in what sense? It is only by conceding its validity, that it is pertinent to inquire whether the remedy is in equity, or by a suit at law.

In other cases the reasoning is syllogistic and summary. "*Qui non habet, ille non dat.*" A mortgage is a grant. Therefore a mortgage of what one does not own, or of what is not *in esse*, is void.

But a mortgage is a grant, *to be defeated upon a condition*. This makes it merely *the creation of a lien*, with certain rights to secure and enforce it. A lien may be created without a grant. And sometimes a contract intended as a *grant*, but ineffectual as such, will be upheld in equity as a *lien*. So that the syllogism is by no means certain to dispose of the question.

As a general proposition it may be said, that a mortgage of such goods as may be in a store on a future day,—or of such furniture as may be in a house,—or of such machinery as may be in a mill,—or of such stock as may be on a farm,—when no particular property is referred to, will not convey any title to, or create any lien upon, such property subsequently acquired, which can be upheld or enforced in a suit at law. *Head v. Goodwin*, 37 Maine 181; *Barnard vs. Eaton*, 2 Cush. 294; *Codman vs. Freeman*, 3 Cush. 306; *Otis vs. Sill*, 8 Barb. 102; *Gardner vs. McEwen*, 19 N. Y. (5 Smith) 123; *Tapfield vs. Hillman*, 46 Eng. C. L. 243; *Lunn vs. Thornton*, 50 Eng. C. L. 379; *Gale vs. Burnell*, 53 Eng. C. L. 850. In Connecticut, a mortgage of a shifting stock of goods in a store, was held to create the same lien upon goods subsequently purchased as upon those owned at the time. *Holly vs. Brown*, 14 Conn. 255.

A similar decision was made in this State, in the case of *Head vs. Goodwin*, 37 Maine 181. But that case was questioned in *Jones vs. Richardson*, 10 Met. 481; and it was substantially overruled in *Pratt vs. Chase*, 40 Maine 269. The question is therefore no longer an open one in this court.

It should be noticed, however, that in nearly all the cases cited, the mortgages were exceedingly indefinite. Some of them described no particular property which could be identified; but they were mortgages of mere contingencies of such property as the mortgagors *might* purchase, *if* they should purchase any. They were void for *uncertainty*, if for no other reason. *Winslow vs. Merchants' Ins. Co.*, 4 Met. 306. Except the case of *Otis vs. Sill*, 8 Barb. 102, they probably would not have been upheld *in equity*, any more than *at law*. *Mogg vs. Baker*, 3 Mees. & Welsb. 195; *Moody vs. Wright*, 13 Met. 17.

We can understand these cases better by referring to another class in which conveyances of property, not in existence at the time, have been upheld, either at law or in equity. And we think it will be seen that sales or mortgages of such property have been sustained when within the following rules.

1. The contract must relate to some particular property described therein, which, though not in existence, must be reasonably certain to come into existence, so that the minds of the parties may be in agreement as to what it is to be, and, *if the sale is absolute*, what, with reasonable certainty, taking the ordinary contingencies into consideration, is the present value.

2. The vendor or mortgagor must have a present, actual interest in it, or *concerning* it. As is said in illustrating Rule 14 of Bacon's Maxims, "the law doth not allow of grants, except there be the *foundation* of an interest in the grantor." There must be something *in presenti*, of which the thing *in futuro* is to be the product, or with which it is to be connected, as necessary for its use, or as incident to it, constituting a tangible, existing basis for the contract.

The application of these principles to the multifarious affairs of a business people, may sometimes be difficult. And in the various

enterprises that are likely to be undertaken in a country distinguished for its manufactures, and its domestic and foreign commerce, new applications of them from time to time may be required. But the illustrations to be found in the decided cases will be sufficient for our present purpose.

Thus, one may sell all the wool which shall grow for a term of years on sheep *owned by him* at the time; but not the wool to be grown on so many sheep, *if he does not own them*. *Grantham vs. Hawley*, Hobart 132; *Smith vs. Atkins*, 18 Verm. 461. So he may sell the grass, or any crop that does not require annual renewal, that shall grow upon *his farm* for a term of years. *Jencks vs. Smith*, 1 Coms. 90; *Bank of Lansingburg vs. Crary*, 1 Barb. 542; *Milliman vs. Neher*, 20 Barb. 37.

If one contracts *for the construction* of a carriage, or a vessel, for himself, and pays therefor, he acquires no title until it is completed and delivered. *Mucklow vs. Mangles*, 2 Taunt. 318; *Comfort vs. Kiersted*, 20 Barb. 472. But if he *buys* a chattel in process of construction, and it is delivered to him, though afterwards to be finished, the title passes, and the additions made to it for the purpose of completing it become his property from the time when they are attached to it. The only reason why the conveyance of a vessel on the stocks was not upheld as a mortgage, in *Bonsey vs. Amee*, 8 Pick. 236, was because there was no delivery, and the registry law had not then been enacted, which renders a delivery unnecessary. *Call vs. Gray*, 37 N. H. 428. A mortgage of unfinished chattels gives the mortgagee a good title to them when finished. *Harding vs. Coburn*, 12 Met. 33; *Jenckes vs. Goffe*, 1 R. I. 511; *Perry vs. Pettingill*, 33 N. H. 433.

So the owner of a ship may assign the freight of a voyage which has been commenced. *In re ship Ware*, 8 Price 269; *Douglas vs. Russel*, 1 M. & K. (7 Eng. Ch.) 488. Or he may sell the oil and cargo to be brought home from a whaling voyage then being prosecuted. *Langton vs. Horton*, 1 Hare 549; *Fletcher vs. Morey*, 2 Story 555. And a laborer, employed by another, may assign his wages *afterwards to be earned*; but not unless they are to be earned under an existing contract. *Mulhall vs. Quinn*, 1 Gray

105; *Twiss vs. Cheever*, 2 Allen 40; *Lannan vs. Smith*, 7 Gray 150.

In the case at bar, the subject-matter of the contract was sufficiently definite and certain; its subsequent existence was reasonably sure; and the mortgagors had an existing interest in, and title to, the other property then mortgaged, of which this was to be an essential part, necessary for its use, to be added to it for the purpose of finishing it. It is entirely unlike the case of a changing stock of goods.

The mortgagors had a charter for a railroad, with all the necessary franchises and rights for its construction, equipment, and operation. The mortgagee had previously contracted to construct *and equip* it for the company; and the work had been commenced. He was to be paid partly in the bonds of the company, which would sell in the market. Thereupon they mortgaged to him, and *in trust for the holders of the bonds*, their franchise, road, rights of way, materials, buildings, completed, or in process of construction, "including all cars, engines, and furniture, that have been *or may be* purchased for or by said company," to secure the contract "for the construction and equipment of said railroad," and to secure the payment of the bonds to be issued to the mortgagee, to him, "or to his assigns, who shall become the holders of said bonds."

A large part of the numerous railroads in this country have been constructed by the aid of mortgages, to individuals, or to trustees. Many of these mortgages, perhaps most of them, embrace, specifically, engines and cars, *to be subsequently acquired*. As they are made to secure bonds not to be due for many years, and the rolling stock is perishable, unless such future acquisitions can be mortgaged, as incident to, and essential to the use of, the railroad itself, the security is liable to be greatly diminished. The question is one of great importance in respect to the interests involved in its determination. Nor is it a new one. It has been considered by several courts of the highest respectability; and such mortgages have been sustained, not only as to existing property, but as to that subsequently acquired. *Pierce vs. Emery*, 33 N. H. 484; *Seymour vs. C. & N. F. Railroad Co.*, 25 Barb. 286; *Trust Co. vs. Hen-*

drickson, 25 Barb. 484; *Coe vs. Hart et al.*, 6 Am. Law Reg. 27; *Pennock vs. Coe*, 23 Howard 117; *Phillips vs. Winslow*, 18 B. Monroe 531.

In nearly all these cases the question is discussed with much research and force of reasoning. And, in the absence of contrary decisions, they constitute a weight of authority not to be disregarded, unless it can be clearly shown that they are erroneous.

In some of them, the companies were specially empowered by legislative acts to mortgage their property and *franchises*. In the case of *Howe vs. Freeman*, 14 Gray 566, such a mortgage was upheld on the subsequent confirming statute, with an intimation that otherwise it would have failed. But the general question was not considered by the Court. The power of a corporation, without any legislative act, to mortgage its *franchises* with other property, to secure its liabilities, has never been questioned in this State, though such mortgages have been common for many years, and rights under them have been determined in this Court. The weight of authority in this country is in favor of the doctrine that the power to mortgage is incident to the rights granted by the act of incorporation. Even if the franchise *to be a corporation* cannot be assigned, "the franchises to build, own, and manage a railroad, and take tolls thereon, are not necessarily corporate rights; they are capable of existing in and of being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable." CURTIS, J., in *Hall vs. Sullivan Railway*. At most, it would seem that an assignment can only work a forfeiture. And if the State waives such forfeiture, the question cannot be raised collaterally by other parties. The cases on this subject are cited and reviewed in Redfield on Railways, § 235, notes 19 and 20. The mortgage, in the case at bar, of all the franchises and property of the corporation, is as effectual between the parties to it, as if, like those in some of the cases cited, it had been made under a special act of the legislature. Whether the assignees of the mortgage, without any further proceedings, legislative or judicial, will have all the *corporate* rights of the company, is not a question now presented. The subsequent statute of 1852, prohibiting any com-

pany from assigning any rights under its charter without the consent of the legislature, expressly excepts mortgages made to secure debts of the corporation, and recognises their validity. R. S., ch. 51, sec. 31.

In the case of *Trust Company vs. Hendrickson* it was held that, as between mortgagors and mortgagees, the engines and cars were *fixtures*, so that, without any express grant, they would have become the property of the mortgagees by being attached to the railroad. If they were fixtures, that result would follow, although they were not in existence when the mortgage was given. That they have some of the qualities of fixtures cannot be denied. They are fitted to the gauge of the road, and are adapted to the particular use upon it. In the modern cases, whether an article is a fixture is determined more by such considerations, than by its being actually attached to the land. Without the rolling stock, the road is not only worthless to the company, but it ceases to be of any *public* use. Important public interests are therefore involved in the question.

But if the engines and cars are not fixtures, they are so connected with the railroad, and so indispensable to its operation, that there is a clear distinction between them and other kinds of personal property. They may well be held to be exceptions to the general rule that property not *in esse* cannot be conveyed. We do not mean to intimate that rolling stock to be subsequently acquired could be mortgaged *without the railroad*. But when the railroad itself is mortgaged, with the franchise, the rolling stock to be acquired for the purpose of completing or repairing it is so appurtenant to it, that the company have a present, existing interest in it, sufficient to uphold the grant of both together—the one as incident to the other. Their title to the railroad is “the *foundation of an interest*” in the cars and engines to be acquired for its use.

“If the rolling stock on the road should be removed,” says McLEAN, J., in the case of *Coe vs. Hart*, “it would defeat the liens of creditors to many millions of dollars, and put an end to the construction, if not to the maintenance, of railroads.” In the case of *Ludlow vs. Hurd*, 6 Am. L. Reg. 493, STORER, J., remarks: “It

is very clear that we must regard it (the rolling stock), as appurtenant to a railroad ; it is necessary for the working of it that all this species of property should become a part of the road itself. It is essential to its use ; and if denied, it is destructive to the purpose for which it was built." And in the case of *Phillips vs. Winslow*, before cited, the Court say that, in order to render the mortgage of the railroad effectual, "it is necessary that it should embrace all such future acquisitions of the company as are proper accessions to the thing pledged, and essential to its enjoyment."

That a mortgage of a railroad and the franchises of the company, with all the rolling stock then owned and to be afterwards acquired and placed on the road, will create a valid lien upon cars and engines subsequently purchased, there would seem to be no longer any doubt. Redfield on Railways, § 235, notes 21 to 24 ; Pierce's Am. Railroad Law 531 ; Am. Law Reg., July 1863, 527.

The decisions sustaining such mortgages are not understood to be in conflict with those in which other mortgages of such property have not been upheld. The general rule, that property not *in esse* cannot be conveyed, is not abrogated. Nor will such mortgages be upheld in equity, any more than at law, unless they are within some of the exceptions to the rule. But if a mortgage is within any of the exceptions it will be sustained, and the parties will be entitled to appropriate remedies.

What remedies will be open to them must depend upon the circumstances of each case. In *Holroyd vs. Marshall*, 9 Jur. N. S. 213, recently decided by the House of Lords, a registered mortgage of machinery in a mill, together with all that should afterward be placed therein in addition to or in substitution for that which was there at the time, was held to have created a valid lien upon the portion afterwards purchased, from the time when it was brought within the terms of the grant. And the rights of the mortgagee were sustained *in equity*, on the ground that the mortgagor, as soon as he purchased the additional machinery and put it into the mill, held it *in trust* for the mortgagee. Whether we should uphold such a mortgage, is a question upon which it is unnecessary to express any opinion. The case seems to be in conflict with that of *Moody vs. Wright*, 13 Met. 17. But in those cases in

which a mortgage of such property is valid, there would seem to be no doubt that it can be enforced in equity as a case of *trust*.

It has been suggested by counsel that, if the mortgage in the case at bar can be supported in equity, it cannot be in this suit at law. We have already seen that this action of trover must fail, because it is not an appropriate one in which to try the question of title. But if it were otherwise, the mortgage being sustainable in equity, the result would be the same. The property was in the custody of the Court, upon a bill in equity, which is still pending, brought for the purpose of determining the rights of all persons to all the property mortgaged. The suit at law is incidental to the bill in equity, having been brought by special permission of the Court. It cannot be permitted to defeat the proceedings in equity, in regard to any property embraced in the mortgage. If the equitable title is in the assignees of the mortgage, and they, or the *cestuis que trust*, are seeking to enforce their rights by a bill in equity, the property being in the hands of a receiver, it would be strange indeed if the whole proceedings could be defeated by the assertion of the legal title subject to the mortgage. The bill in equity having been commenced first, and the property taken possession of under it, all incidental claims, whether by a suit at law or otherwise, are merely interlocutory. Upon whatever property the bill is finally sustained, it will operate to convert *equitable* into *legal* titles. Therefore no suit at law, however appropriate, could be sustained for the possession of any property to which the trustees have an equitable title.

Upon the whole case, we are of the opinion that the mortgage to Myers created a valid lien upon the engines and cars as they were purchased and placed upon the road for the purpose of equipping it; and that the holders of the bonds secured by that mortgage will be entitled, if they claim it, to have the trust enforced, not only against the railroad, but against the rolling stock subsequently acquired.

Plaintiffs nonsuited.

The foregoing opinion, which has been prepared with great thoroughness and care, has been furnished us by the courtesy of Mr. Justice DAVIS. There

are many questions of considerable practical interest involved in the discussion which will repay a careful reading.

1. The precise point of the rights of adversary claimants to prosecute their claims against a receiver of the Court of Chancery, while acting in that capacity, is here very clearly stated. The doctrine as one of the established principles of chancery practice, is very clearly established, that Courts of Chancery will, in the language of Chancellor WALWORTH in *Parker vs. Browning*, 8 Paige 388, "where the property is legally and properly in the possession of the receiver," * * * "protect that possession, not only against acts of violence, but also against suits at law, so that a third person claiming the same may be compelled to come in and ask to be examined *pro interesse suo*, if he wishes to test the justice of such claim;" or, as is held in other cases, obtain leave to prosecute his claim against the receiver. But the exact point of the proper limitation to be applied to this doctrine is stated very forcibly in the principal case, and especially the distinction between suits for the *value* of personal property in the possession of the receiver, and those for the *possession* of the specific property. See *Peck vs. Crane*, 25 Vt. R. 146.

2. The question of the capacity of the mortgator of future acquired personal estate, to create a valid present property therein, is here examined with thoroughness, and discussed with great clearness and precision. The point is every day becoming more and more important, not to use any stronger expression; and we are sorry to feel that the American Courts do not seem, as yet, to have fully waked up to the magnitude of the interests involved in that and kindred questions. The public interest, and the necessities of business men, under the

pressure of commercial exigencies, generally outrun and take the lead of the Courts of justice, in moulding present means and appliances to the multiplying emergencies which an advancing civilization is constantly presenting. This is indeed the natural order of things, and when the Courts attempt to take the lead in law reforms of that character, it is not, as a general thing, so judiciously accomplished as when chiefly matured by the practical experience of business men. But it has seemed to us that the time had fully come for the American Courts to recognise the power of a Court of Equity to give full effect to a contract of mortgage of future acquisitions of personal estate. The only possible embarrassment in giving effect to such contracts as contracts for a future mortgage, and in allowing them to take effect in presenti *by way of trust*, whenever such property is acquired, the mortgagor and future purchaser from the moment of acquisition, standing as the trustee of the mortgagee, consists in the want of visible, substantial possession in the mortgagee. But this will be effected through the registry so soon as such contracts are recognised as creating a valid subsisting equitable mortgage. This principle is fully adopted in the case of *Holroyd vs. Marshall*, 9 Jur. N. S. 213, decided by the House of Lords within the last year. The general question was there discussed at length, by the present Lord Chancellor WESTBURY, by Lord WENSLEYDALE and by Lord CRANWORTH, and all the English cases bearing upon the question, elaborately reviewed, and the following points held clearly established in the English law.

1. That at law a mortgage or sale of future acquired personal property, the mortgagor neither having acquired the thing or the agent of its production at

the time of making the contract, creates no valid subsisting property. But even at law, if the future acquired property be the product of present property in the mortgagor, or what is expressed more briefly, as potentially, his property, as the wool growing on a flock of sheep, or the produce of a dairy, or a farm, or anything of that character, the contract of mortgage will take effect upon the property as soon as it comes into existence, and will be perfectly binding at law. And, on the other hand, where the contract is not understood to identify any particular property, so that it can be known to what it was intended to apply, it will have no binding effect, either at law or in equity. *Mogg vs. Baker*, 3 M. & W. 195.

2. But where the contract is of so specific a character that a Court of Equity would decree a specific performance, it will always create a valid, present interest in equity, which a Court of Chancery will enforce against any future incumbrancer, whether with or without notice. And in such cases it is not requisite, in order to protect the right of the mortgagee, that proof be made of any act on his part looking towards actual possession of the goods, or of their identification under the contract, or of any notice in fact to the subsequent incumbrancer at or before his interest attached.

It has been held that where the assignment is of future property entirely of an indefinite character, as of the future earnings of a ship not on a voyage then contemplated, but without reference to any particular voyage, that the contract remaining in force will attach to the property when it comes into existence, and may be made available by some new act of possession or identification, as Lord BACON's maxim has it, "*novus actus interveniens*." And

accordingly many contracts of this class contain a power to take possession of such future acquisitions. See *Robinson vs. MacDonell*, 5 Mau. & S. 228; *Lunn vs. Thornton*, 1 C. B. 379; *Congreve vs. Evetts*, 10 Exch. 298; *Hope vs. Haley*, 5 Ell. & Bl. 830-845. s. c., 34 Eng. L. & Eq. R. 189.

Some cases have been understood to favor the construction that some such future act of possession or identification was necessary in all cases, where property not *in esse* was attempted to be assigned, at least as against future incumbrances; or else that there should be distinct evidence of notice to the subsequent incumbrancer. *Langton vs. Horton*, 1 Hare 549; *Whitworth vs. Gaugain*, 1 Phill. 738.

But even this requisite has been repudiated in later and better considered cases. Lord ST LEONARDS, in *Abbott vs. Stratton*, 3 Jo. & Latt 603; *Whitworth vs. Gaugain*, 3 Hare 416; and the same case affirmed by the Chancellor, *ubi supra*. Stress is indeed placed by the Lord Chancellor in *Metcalfe vs. The Archbishop of York*, 1 Myl. & Cr. 547-555, upon the fact of notice to the subsequent incumbrancer. But that fact was declared unimportant in many of the cases already cited, and especially in the late case of *Holroyd vs. Marshall*.

2. This subject has been under consideration in numerous cases in the American Courts, affecting railway mortgages, and so far as appears no question has ever been made by those Courts in regard to the entire validity of such mortgages, even when made to cover the future accessions and acquisitions of the road; and as against subsequent incumbrances equally with the mortgagors in all cases where the corporations possessed full power to execute valid contracts of the character in question. *Howe vs. Freeman*, 14 Gray

R. 566 ; *Pennock vs. Coe*, 23 How. U. S. Rep. 117. See also *Willink vs. Morris Canal & Banking Co.*, 3 Green. Ch. Rep. 402.

3. The franchise to build and operate a railway is an important property in itself, and whenever the power to assign such franchise as security for debt exists, it must necessarily carry with it all accessory and incidental acquisitions, which attach to the franchise, and constitute the structure and accessory fixtures, together with the rolling stock, which, although not in itself strictly a fixture, is obviously an indispensable adjunct or accessory, so that the right to create a valid incumbrance upon a railway, and its future accessions and acquisitions, in no sense contravenes any of the decisions, at law, wherein it has been held that no valid assignment of non-existing property could be made.

4. The question incidentally discussed in the principal case, in regard to the capacity of a railway company to create a valid lien, in equity at least, upon its roadway and other property, without any special legislative sanction, either directly or indirectly, through the means of either general or particular provisions of statutes, is one of so much uncertainty, under the existing state of the decisions, that very little definite and reliable information can at present be given in regard to it. Judging of the thing upon principle merely, we should not have supposed there was any inimicable obstacle to the creation of such a lien ; but we have been more inclined of late than formerly, to the opinion that such a contract did require express or implied legislative sanction, independent of the mere creation of the corporation. The decisions in the English Courts, so far as the question has been raised there, which can hardly be said to have occurred in any very definite

form, are all against any such power existing in railway corporations, except by the consent of the legislature. The assignment and transfer of the possession and use of these public works, which have engrossed almost the entire trade and transportation of the country, is held, in England, exclusively under Parliamentary powers, and does not seem to be considered as coming within the general discretion of Courts of Equity. Hence all contracts, looking towards the ultimate transfer of such use or possession, in contingencies distinctly provided for in the instrument, if made without Parliamentary authority, are there regarded as invalid. How far it may be practicable to create pledges of the earnings or tolls of such corporations, without a concurrent right to assume the control of the works, except through the officers of a Court of Chancery, is a question not much discussed in this country. Contracts of that kind do not seem to involve any transfer of the corporate franchises or any change in their control, except through the agency of the Courts of Equity ; and their enforcement might come within the general powers of Courts of Equity. But we apprehend it is not competent for a Court of Equity to transform a contract in the form of a mortgage, and for whose execution no power existed in the corporation, into one of an entirely different character, which might have been executed by the parties and carried into effect by the Courts, and probably would have been, if the defect of authority had been fully understood. And if this even might be allowable, between the original parties, it certainly could not be done against subsequent incumbrancers, where legal priority is generally regarded as of the essence of the rights in controversy.

I. F. R.